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CITATIONS

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28 U. S. C. 2243	2, 8

which denied the petition for a writ of habeas corpus. After respondents had sought certiorari before judgment in the Court of Appeals on their appeal, petitioner also sought certiorari before judgment on his appeal. Both petitions were granted on June 21, 1957, and the cases consolidated for argument. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether it was error for the District Court, upon ascertaining the nature of petitioner's contentions and the relief desired, to refuse to order petitioner's outright release, to treat petitioner's application for a writ of habeas corpus as an action for a declaratory judgment and injunction, and to fashion relief accordingly.

STATUTE INVOLVED

28 U. S. C. 2243 provides:

> A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.
>
> The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.
>
> The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

STATEMENT

In his petition for a writ of habeas corpus, filed on June 6, 1957 (Appendix, *infra*, pp. 15–19), petitioner alleged that he was in the military service of the United States, and that on or about January 30, 1957, he had been arrested and thereafter held in confinement for the purpose of being delivered to the government of Japan for trial. Claiming that he could not validly be turned over to the Japanese government, petitioner sought his production before the court to inquire into the validity of his restraint and "such other further and equitable relief" as the court should deem proper.

Respondents in their return (Appendix, *infra*, pp. 19–22) alleged *inter alia* that petitioner's term of enlist-

ment was not due to expire until October 27, 1957[1] and that petitioner was "on a normal duty status restricted by military orders to the military base of Camp Whittington." At the hearing petitioner did not claim that he was entitled to be released from the army and did not contend that he would not be subject to trial by court-martial. His basic contention was that it would be a violation of his rights to allow the government of Japan to try him in its courts.

The District Court held that the administrative restriction of petitioner to the limits of the camp was sufficient restraint for the purposes of habeas corpus, but that, since petitioner would remain a member of the United States armed forces in Japan and might be prosecuted in court-martial proceedings, the petition for the writ of habeas corpus would be denied. Treating the petition as one for declaratory judgment and injunctive relief, the court enjoined respondents

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[1] Petitioner, while at all times stating that he was in the military service, originally alleged that his last term of enlistment had expired on February 12, 1957. That claim was dropped in his Reply to Return and Answer to the Rule to Show Cause (Appendix, *infra*, p. 22), which stated that it was on that date that he was to have been returned to the United States (presumably for rotation). In this Court, both the petition for certiorari in No. 1108 and the petitioner's brief agree that petitioner is currently a soldier in the United States Army and make no issue over any alleged termination of his enlistment or any obligation to be returned to the United States on rotation or otherwise. His service record shows that his enlistment in the Regular Army will expire on October 27, 1957. See the petition for a writ of certiorari in No. 1103, Appendix C, p. 54a, and Government Exhibit No. 3 in the record in that case.

from delivering petitioner to the Japanese government.

SUMMARY OF ARGUMENT

In this proceeding, petitioner complains only of the fact that the District Court, although granting him injunctive relief, denied the petition for a writ of habeas corpus. Assuming that the District Court was correct on the merits, the relief which it granted was appropriate.

1. At the hearing before the District Court, it became evident that petitioner was not really seeking relief from custody; he was seeking to prevent future executive action allowing him to be tried by the Japanese authorities. The injunctive relief granted was thus the only suitable remedy if his claim was valid.

2. Even if traditional habeas corpus forms had been followed, the result would not have been different. A court has power to fashion relief as "law and justice require".

ARGUMENT

This case has been consolidated with No. 1103, this Term, which raises serious questions as to the correctness of the decision below and whether the District Court properly enjoined respondents here from delivering petitioner to the Japanese Government. The sole issue raised in this case, No. 1108, is as to the District Court's failure to order petitioner's release. If the Government prevails in No. 1103, there will of course be no merit to petitioner's claim in this case. But in any event we believe there is no substance in petitioner's position. The writ of habeas corpus was not an appropriate remedy under the circumstances

of this case, and, if it were, the relief granted by the District Court relieved petitioner of that custody of which he complained.

1. *Habeas corpus was not an appropriate remedy under the circumstances of this case*

Assuming, as we do, that petitioner's being restricted to the base was sufficient restraint for habeas corpus (but see *Wales* v. *Whitney*, 114 U. S. 564), and that the District Court had jurisdiction to issue the writ for a person in Japan,[1] nonetheless, release from Camp Whittington was not the relief which petitioner desired. Petitioner was not seeking his release from the custody of the army; he was not seeking transfer from one authority to another (such as from military to civil jurisdiction), as in the cases he cites. He was not even seeking a revision of the custody in which the army was then holding him since he was not challenging the right to be administratively confined for grounds other than for transfer to the Japanese government. Rather, he was seeking to have

[1] In view of the disposition of the case by the District Court, and for the reasons stated in the text, there is no need to consider the question of whether habeas corpus is available to test the detention of an American held by American authorities in Japan. Under 28 U. S. C. 2241, writs of habeas corpus may be granted by district courts only "within their respective jurisdictions". In *Ahrens* v. *Clark*, 335 U. S. 188, the Court found that this limitation referred to the territorial jurisdiction of each court, and held that the District Court for the District of Columbia did not have jurisdiction to issue a writ with respect to prisoners on Ellis Island, New York. But that decision, as well as subsequent decisions of this Court, have left open the question of whether a different result would be reached where United States citizens

himself retained in, not transferred out of, the very detention in which he was being held.[3]

The function of the writ of habeas corpus is to bring about release from custody. This Court said in *McNally* v. *Hill*, 293 U. S. 131, 137, that there is "no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could not affect the lawfulness of the custody and detention, * * *". As was pointed out in *Orloff* v. *Willoughby*, 345 U. S. 83, 93, it is not the function of the writ to revise duty orders of one lawfully in service.

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were being held in custody by United States officials overseas, outside of the jurisdiction of any district court.

Even if this were still deemed a strict habeas corpus proceeding, the Court need not reach the question of whether the District Court for the District of Columbia has jurisdiction to grant a writ of habeas corpus for a person who at all relevant times has been in Japan. As shown in our brief in No. 1103, the merits of the case are clear. And if the merits are clear, it is permissible to pass over a jurisdictional problem of greater difficulty where the resolution of that issue would not change the result. See *Brooks* v. *Dewar*, 313 U. S. 354, 359–360; *Johnson* v. *Eisentrager*, 339 U. S. 763, 790–791; *Secretary of Agriculture* v. *Central Roig Ref. Co.*, 338 U. S. 604, 619–620.

If the Court should feel it necessary to reach the jurisdictional issue, the Government's present position is that the implications of the ruling of this Court in *Reid* v. *Covert*, No. 701, October Term, 1955, decided June 10, 1957, as well as of other decisions subsequent to *Ahrens*, militate against any construction of 28 U. S. C. 2241, *supra*, which would deprive an American citizen overseas of the constitutionally-protected remedy of habeas corpus, where the requirements of custody are shown.

[3] The validity of a detention questioned by a petition for a writ of habeas corpus is to be determined by the conditions existing at the time of the final decision thereon (*Mensevich* v. *Tod*, 264 U. S. 134, 137) and not merely on the basis of the original allegations.

As noted, the only restraint to which petitioner objects is that he is restricted to Camp Whittington—and he does not in fact object to that restraint but only to its purpose. For if peitioner were to leave the base he could at any time be taken into custody by Japanese authorities—the very custody from which he seeks to require the United States to protect him. Petitioner thus sought not freedom to travel within Japan, but rather the protective custody of the United States. Petitioner was calling for affirmative action by the United States armed forces to protect his alleged right to be a fugitive from Japanese justice. This was granted by the District Court.

Petitioner could not, and does not, complain of restriction to the base for other reasons. Certainly, the courts will not review on habeas corpus the right of a commanding officer to deny a pass to a soldier for whatever reason he sees fit. But, to repeat, the substance of petitioner's complaint was that action was about to be taken to change his custody which would, he alleged, violate his constitutional rights and for which damages would not be an adequate remedy. The court therefore properly treated the petition as one for declaratory and equitable relief.

2. *The relief granted by the District Court relieved petitioner of the custody of which he complained*

In any event, even if the district judge had acted within the precise framework of the habeas corpus proceeding, the actual result would be no different from the one presently ordered. Petitioner himself admits that the statute, 28 U. S. C. 2243, gives a court power to "dispose of the matter as law and justice

require." This Court has many times held that, under such power, a district court may withhold the issuance of the writ pending corrective action by other courts or by administrative authority. See *Tod* v. *Waldman*, 266 U. S. 113, 118, where this Court ruled specifically that the lower court should not have directed the discharge of excluded aliens who had been denied a fair hearing, but should have ordered their discharge only if a proper administrative appeal were not granted within 30 days. See also *Dowd* v. *Cook*, 340 U. S. 206; *Mahler* v. *Eby*, 264 U. S. 32, 46; *In re Bonner*, 151 U. S. 242, 261. Habeas corpus does not require the immediate discharge of a prisoner; the court may frame some other order appropriate to the circumstances. *Chessman* v. *Teets*, No. 893, this Term, decided June 10, 1957. Hence, even on petitioner's theory that relief should have been granted in the habeas corpus proceeding as such, the District Court was not obliged to order petitioner's immediate discharge from the custody in which he was being held; the court was free to issue any appropriate order which would insure petitioner that the custody in which he might be held would be legal, not illegal.

The only illegality alleged by petitioner as to his restraint was that he was being restrained "for the purpose of being delivered over to the government of Japan." Se Paragraphs 2 and 3 of the Petition for Writ of Habeas Corpus, *infra*, p. 16. By enjoining petitioner's delivery, the court removed the sole aspect of the custody of which he complained.

If traditional habeas corpus forms had been followed, the same relief would have been accorded him by directing his release unless he was restricted

to the base for some other reason. But by enjoining the respondents from delivering petitioner to the Japanese Government the court prevented petitioner from being confined for that purpose. If the decision should be affirmed, it is plain that petitioner could no longer be restricted to Camp Whittington except for other reasons—the possible existence or validity of which petitioner does not and cannot challenge.

Petitioner's complaint as to the District Court's remedy is thus wholly one of form, not of substance.

CONCLUSION

It is respectfully submitted that the order denying the petition for a writ of habeas corpus should be sustained.

J. LEE RANKIN,
Solicitor General.
ROGER FISHER,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
Attorney.

JULY 6, 1957.

APPENDIX

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In the United States District Court for the District of Columbia

H. C. 47–57

WILLIAM S. GIRARD, UNITED STATES ARMY SPECIALIST 3/C, PETITIONER

v.

CHARLES E. WILSON, SECRETARY OF DEFENSE; JOHN FOSTER DULLES, SECRETARY OF STATE; WILBUR M. BRUCKER, SECRETARY OF THE ARMY; GENERAL MAXWELL D. TAYLOR, HEAD JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE; MAJOR GENERAL W. H. MAGLIN, PROVOST MARSHAL GENERAL, UNITED STATES ARMY; GENERAL LYMAN LEMNITZER, COMMANDING GENERAL, FAR EAST COMMAND; RESPONDENTS

PETITION FOR WRIT OF HABEAS CORPUS

The petition of William S. Girard by his brother, Louis Girard, and his attorneys, Earl J. Carroll of San Francisco, California, Joseph S. Robinson of New York City, N. Y. and Dayton M. Harrington of Washington, D. C. upon information and belief, respectfully shows:

1. That the petitioner, William S. Girard, is a citizen of the United States and a resident and citizen of the State of Illinois. That he is now and has been since November 9, 1953, in the Military Service of the United States presently holding the rank of United States Army Specialist 3/C. Petitioner is currently held, pursuant to Military orders and by direction of the Military Authorities, in the territorial bounds of Japan and within the jurisdiction of the Far East Command of the United States Army. Peti-

tioner's last term of enlistment expired on February 12, 1957 on which date he was to be returned to the United States for separation from Military Service.

2. That heretofore and on or about January 30, 1957 the petitioner was arrested and thereafter held in confinement by the Military Authorities of the United States. The petitioner is presently held in such confinement by the said Military Authorities and at the instance of the United States Secretary of State for the purpose of being delivered over to the government of Japan for trial for an alleged offense over which that government of Japan has no jurisdiction, nor has the government of Japan any jurisdiction over the person of the petitioner.

3. Petitioner alleges that his detention by the Respondents for the purposes hereinabove alleged, is illegal and in violation of the Constitution and Laws of the United States as well as the Treaty Rights and obligations of the Government of the United States.

4. Petitioner alleges further that the reasons assigned by the Secretary of Defense and the Secretary of State in their joint statement of June 4, 1957 for his detention, are invalid in law and in violation of the fundamental, constitutional and legal rights of the petitioner and his continued detention by the respondents herein and their subordinates in command are without authority in law.

5. That the respondent herein, Hon. Charles E. Wilson, Secretary of Defense, is the highest ranking official of the military establishment of the United States and is by law and custom of the Military Service, empowered to issue orders to subordinates in command including the Military Personnel who hold the petitioner in confinement at United States Army Camp Whittington in the vicinity of Tokyo, Japan.

6. The respondent, John Foster Dulles, is the Secretary of State of the United States and as such is the highest ranking official of the State Department of the United States; the respondent, Wilber M. Brucker, is Secretary of the Army and as such is the highest ranking official of the Army of the United States; the respondent, General Maxwell D. Taylor, is the Head of the Joint Chiefs of Staff and as such is the highest ranking Military Official of the United States Military Establishment; the respondent, Major General W. H. Maglin, is Provost Marshal General of the Army of the United States and as such is the highest ranking Army Official having jurisdiction over the Military Police Force and over persons held in confinement by such Military Police and the respondent, General Lyman Lemnitzer, is the Commanding General of the Far East Command of the United States Military Establishment and as such is in command of all the United States Military Forces in the area wherein the petitioner is presently held in confinement. All the respondents herein named are by law and custom of the Military Service empowered to issue orders to subordinates in command and to all persons who now physically hold the petitioner in confinement and said respondents are duty bound to take such action as respects the petitioner as the Honorable Court may order and direct.

7. That the cause or pretense of the restraint of the petitioner is as hereinabove set forth and the imprisonment and restraint of the petitioner for the purposes of delivering him to a foreign government as set forth in the joint statement of the State and Defense Departments on June 4, 1957 is illegal and in violation of the petitioner's fundamental and constitutional rights as a citizen and resident of the United States serving in its Armed Forces.

8. Your petitioner further alleges that any treaty or agreement purported to authorize and or empower any official of the United States to hold, imprison or confine a citizen of the United States for the purpose of transferring him to a foreign jurisdiction under the circumstances set forth in this petition, is illegal and in violation of the Laws and Constitution of the United States.

9. No previous application has been made for the relief herein sought to any court or Judge.

WHEREFORE your petitioner prays that a Writ of Habeas Corpus issue directed to Charles E. Wilson, Secretary of Defense; John Foster Dulles, Secretary of State; Wilber M. Brucker, Secretary of the Army; General Maxwell D. Taylor, Head Joint Chiefs of Staff, Department of Defense; Major General W. H. Maglin, Provost Marshal General, United States Army; General Lyman Lemnitzer, Commanding General, Far East Command; and their subordinates in command, requiring them to forthwith have the body of petitioner, William S. Girard, together with the case of his imprisonment and restraint brought before the United States District Court for the District of Columbia or a Judge thereof, to inquire into the legality of his restraint, and

IT IS FURTHER PRAYED that your petitioner be granted such other further and equitable relief as this court may deem just and proper.

(Sgd.) Earl J. Carroll.
EARL J. CARROLL.

STATE OF NEW YORK,
County of New York, ss:

EARL J. CARROLL, being duly sworn deposes and says:

That he is one of the attorneys for the petitioner herein; that he has read and signed the foregoing petition; that he knows the contents thereof; that all matters therein contained are true except those matters stated on information and belief and that such matters he believes to be true.

(Sgd.) Earl J. Carroll.
EARL J. CARROLL.

Sworn to before me this 5th day of June 1957.

EARL J. CARROLL,
and JOSEPH S. ROBINSON,
745 Fifth Avenue, New York 22, N. Y.
Murray Hill 8-1067,

DAYTON M. HARRINGTON,
454 Washington Building, Washington, D. C.,
Republic 7-7137,
Attorneys for Petitioner.

In the United States District Court for the District of Columbia

H. C. 47-57

WILLIAM S. GIRARD, PETITIONER

v.

CHARLES E. WILSON, ET AL., RESPONDENTS

RETURN AND ANSWER TO THE RULE TO SHOW CAUSE

Come now the respondents by their attorney, the United States Attorney, and as a return and answer to the rule to show cause respectfully represent to the Court the following:

1. The petitioner William S. Girard, R. A. 16452809, is a specialist 3rd class in the Regular Army of the United States assigned to Company F, 8th Cavalry

Regiment, at Camp Whittington, Honshu, Japan, having re-enlisted while in Japan on October 28, 1954, for a period of three years. This term of enlistment is to expire on October 27, 1957.

2. On January 30, 1957, petitioner, while on a firing range known as Camp Weir Range in Japan, shot and killed a Japanese woman by firing an expended cartridge case from a grenade launcher which cartridge penetrated her back and caused her death.[1]

3. The above constitutes an offense within the concurrent jurisdiction of both the United States and Japan, consequently coming within the provisions of the Protocol to amend Article XVII of the Administrative Agreement entered into between the United States and Japan pursuant to Article III of the Security Treaty between the governments of these two countries. The above-mentioned Protocol and agreements have been held to be valid and constitutional. *May* v. *Wilson,* C. A. No. 128–56, D. C. D. C. Also *Cozart* v. *Wilson,* 98 U. S. App. D. C. 437, 236 F. 2d 732 (1956). They are essential to the national defense of the United States and a valid exercise of the sovereign power of the United States in the conduct of foreign affairs.

4. Under applicable treaty arrangements, the exercise of jurisdiction by the United States is never mandatory but is discretionary with the United States. The United States has decided not to exercise jurisdiction in this case, and has entered into a valid and binding agreement with Japanese authorities to that effect.

5. Petitioner is not now nor was he at the time of

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[1] There are attached hereto and made a part hereof Government's exhibits 1 through ——. [Not reproduced.]

the filing of this petition in the custody of the United States within the meaning of 28 United States Code 2241. He is and has been on a normal duty status restricted by military orders to the military base of Camp Whittington. The remedy of habeas corpus does not lie under such circumstances. *Wales* v. *Whitney*, 114 U. S. 564 (1885).

The respondents call this to the Court's attention but do not press the point and are prepared to treat the petition as an application for equitable and/or declaratory relief.

6. The petitioner is not now nor was he at the time of the filing of the petition herein within the territorial limits of the District of Columbia. Therefore the United States District Court for the District of Columbia has no jurisdiction to consider his application for a writ of habeas corpus. *Ahrens* v. *Clark*, 335 U. S. 188 (1948). While this point has been decided against the respondents in *Cozart* v. *Wilson*, *supra*, respondents wish to preserve this point.

7. The decision by the United States not to exercise jurisdiction in this case is a discretionary decision of the Executive Branch in the conduct of foreign affairs and the military defense of the United States, and as such is a political decision not subject to judicial review. There has been no abuse of discretion.

CONCLUSION

For the reasons set forth herein together with the attached memorandum [not reproduced] which is by reference made a part hereof, respondents respect-

fully move this Court to dismiss the petition for writ of habeas corpus and to discharge the rule to show cause.

(Sgd) ----------
OLIVER GASCH,
United States Attorney.

(Sgd) ----------
E. RILEY CASEY,
Assistant United States Attorney.

(Sgd) ----------
HAROLD H. GREENE,
Assistant United States Attorney
Counsel for defendant.

In the United States District Court for the District of Columbia

Habeas Corpus 47–57

WILLIAM S. GIRARD, PETITIONER

v.

CHARLES E. WILSON, ET AL., RESPONDENTS

REPLY TO RETURN AND ANSWER TO THE RULE TO SHOW CAUSE

Come now the petitioner by his attorneys and as a reply to the return and answer to the rule to show cause, upon information and belief, respectfully represent to the Court the following:

1. The petitioner William S. Girard, R. A. 6452809, is a specialist 3rd class in the Regular Army of the United States assigned to Company F, 8th Cavalry Regiment, at Camp Whittington, Honshu, Japan, having re-enlisted while in Japan on October 28, 1954.

On February 12, 1957, he was to be returned to the United States.

2. Camp Weir Range is a maneuver area reserved to the United States for its exclusive use by the United States Armed Forces. The United States has consented to occasional use thereof by Japanese authorities provided that such use would not be harmful to the purposes for which said facilities and area were used by the United States Armed Forces, and provided further that it continued to be an area within the exclusive jurisdiction of the United States.

3. On January 30, 1957, while such maneuver area was being used exclusively by the Armed Forces of the United States, the petitioner was stationed there and by the lawful command of his superior officer assigned to guard duty thereon to guard property of the United States. While in such area and in performance of such guard duty he discharged his grenade launcher in performance of his official assigned duty. At about said time a number of Japanese nationals were trespassing on said area for the purpose of stealing property of the United States Government which petitioner was assigned to guard. A Japanese national was allegedly injured by act of the petitioner resulting in death.

4. The facts above stated constitute no offense against the laws of Japan and no offense against the laws of the United States. Nevertheless, the petitioner has been indicted by a Japanese Court and is presently being held in the custody and under the control of United States military authorities in Japan to be handed over for trial before a Japanese Court, to which Court the Military and State Department officials have agreed to hand over petitioner.

5. No valid treaty exists between the United States and Japan providing for the delivery of the petitioner

to Japanese authorities for trial of the offense alleged or for any other purpose.

6. Petitioner is now, and was at all times since the filing of this petition, in the custody of the respondents and their subordinates in command on the military base of Camp Whittington, Japan, to which base he is restricted, and from which base he may not depart.

7. The detention of petitioner is unlawful and the decision to deliver petitioner to a foreign government is without authority in law.

8. Other than herein above pleaded, petitioner denies each and every allegation of the return and answer to the rule to show cause.

Wherefore the petitioner prays that the writ of habeas corpus requested in the petition in support of the rule to show cause be granted.

(Sgd)----------

EARL J. CARROLL.

U. S. GOVERNMENT PRINTING OFFICE: 1957